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South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Atlantic Exposition Services, Inc.

Spectacor Management Group, and Atlantic Exposition Services, Inc. Cases 4-CE-116-1 and 4-CE-116-2

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND TRUESDALE

On March 16, 2000, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondents filed exceptions and supporting briefs, the General Counsel and the Charging Party filed answering briefs, and the Respondent Union filed a reply brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge found that the Respondents, Carpenters Local 623 and Spectacor Management Group (SMG), violated Section 8(e) of the Act by entering into an agreement under which SMG would not subcontract work to employers who did not have collective-bargaining agreements with Local 623, and by enforcing that agreement against the Charging Party, Atlantic Exposition Services, Inc.² In arriving at that conclusion, the judge found that the Respondents' agreement required SMG to

cease doing business with employers who were not signatory to contracts with Local 623 and that it did not have a work preservation objective that would remove it from the proscription of Section 8(e). He also found that the agreement did not come within the construction industry proviso to Section 8(e) because the work in question was not performed on a construction site and because, in any event, SMG was not "an employer in the construction industry."

We agree with the judge, for the reasons stated in his decision, that the Respondents' agreement lacked a work preservation objective, that the work covered by the agreement was not performed on a construction site, and therefore that the agreement was not protected by the construction industry proviso.³ Accordingly, we affirm his finding that the agreement violated Section 8(e). Because we find the violation on that basis, we need not and do not decide whether SMG was an employer in the construction industry, including whether it possessed relevant control over labor relations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its officers, agents, and representatives, and Spectacor Management Group, Atlantic City, New Jersey, its officers, agents, successors, and assigns shall take the actions set forth in the Order.

Dated, Washington, D.C. August 27, 2001

¹ The Respondent Union has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² Sec. 8(e) provides, in relevant part, that

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work[.]

³ In his discussion of the construction industry proviso, the judge stated that "The Board has found that union signatory subcontracting clauses, under certain circumstances, are valid when they are aimed at avoiding friction among contractors and subcontractors at the site with their union and nonunion employees, the *Denver Building Trades (NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951)) problem." In *Carpenters Local 944 (Woelke & Romero Framing)*, 239 NLRB 241, 250 (1978), *enfd. sub nom. Woelke & Romero Framing v. NLRB*, 654 F.2d 1301 (9th Cir. 1981) (*en banc*), *affd.* in relevant part 456 U.S. 645 (1982), which the judge cited, the Board interpreted the Supreme Court's decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), to mean that "the construction industry proviso to Section 8(e) permits subcontracting clauses . . . in the context of a collective-bargaining relationship, and possibly even without such a relationship if the clauses are aimed at avoiding the *Denver Building Trades* problem." Thus, the Board did not hold that signatory subcontracting clauses in the construction industry are lawful *only* if they are "aimed at avoiding the *Denver Building Trades* problem." Rather, it held that the proviso also protects union signatory subcontracting clauses negotiated in the context of collective-bargaining relationships. There can be no suggestion, then, that the Respondents' union signatory subcontracting clause is unlawful merely because there was apparently no "*Denver Building Trades* problem" here.

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
John C. Truesdale	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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James Katz, Esq. and Howard S. Simonoff, Esq. (Tomar, Simonoff, Adourian, O'Brien, Kaplan, Jacoby, & Graziano), of Cherry Hill, New Jersey, for Respondent, Carpenters Local 623.

James A. Matthews, III, Esq. and Hollie B. Knox, Esq. (Fox, Rothschild, O'Brien, & Frankel, LLP), of Philadelphia, Pennsylvania, for Respondent, Spectacor Management Group.

Timothy J. Brown, Esq. (Dilworth Paxson, LLP), of Philadelphia, Pennsylvania, for the Charging Party Atlantic Exposition Services, Inc.

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge. The complaint in this proceeding¹ presents the novel issue of whether the installation and assembly and dismantling of temporary exhibits at trade shows is work encompassed within the construction industry proviso to Section 8(e) of the National Labor Relations Act, 1947, as amended, 29 U.S.C. Sec. 151 et seq. Respondents Spectacor Management Group "SMG" and South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO the (Union) or (Carpenters), insist that their agreement prohibiting the subcontracting of that work to a contractor that does not have an agreement with the Carpenters

¹ The relevant docket entries are: The charges in Cases 4-CE-116-1 and 4-CE-116-2 were filed on October 13 and 14, 1998, respectively, and the complaint was issued on May 28, 1999. This case was heard in Philadelphia, Pennsylvania, on September 28-29, 1999.

² In relevant part, Sec. 8(e) provides:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work.

is valid because the work involved is construction work and the provision has a lawful work preservation object.

Jurisdiction is conceded. SMG is a Pennsylvania joint venture which manages public assembly facilities, such as convention centers, on behalf of municipal partners. In the year before the issuance of the complaint, SMG purchased and received goods valued in excess of \$50,000 directly from points outside New Jersey. SMG has offices in Atlantic City, New Jersey, and is engaged in providing management services on behalf of the Atlantic City Convention Center Authority "ACCCA". The ACCCA, created by the laws of the State of New Jersey, for many years, at least since 1983, operated and managed Atlantic City's Convention Hall, the original facility on the Boardwalk, now designated as Boardwalk Hall (in 1996, a second facility known as West Hall was opened), a public assembly facility which hosts various events, including the Miss America pageant and the subject of this proceeding, trade shows. (The Boardwalk and West Halls are jointly owned and managed and are referred to collectively as the "Center.") Atlantic Exposition Services, Inc. "AES" is a corporation with offices in Egg Harbor Township, New Jersey, and is engaged in providing general services to trade shows in New Jersey and Pennsylvania. It has a collective-bargaining agreement with Painters District Council 711 ("Painters"), which covers its trade show work in New Jersey. In the year before the issuance of the complaint, AES provided services in excess of \$50,000 outside New Jersey. I conclude that SMG and AES are employers within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Questions concerning the jurisdiction of the Carpenters at the Center were not new. The ACCCA had a longstanding collective-bargaining relationship with the Carpenters, covering both its "in house" operation and maintenance "O&M" work and the trade show work, including the work that is disputed here. The agreement³ prohibited subcontracting of Carpenters' work, as follows:

The Employer agrees it will not subcontract any of the work described in Article XI as it pertains to exhibitions, or to normal and routine maintenance work as performed in the past, which work traditionally has been performed by the Employer's employees at the Convention Center. All such work shall be retained and preserved by Carpenters in accordance with past practice. All such work will be performed by the Employer's employees only, and will not be performed by any subcontractors or the Employer, or its tenants or contractors or subcontractors of tenants.

Under this provision, the Carpenters consistently took the position that certain trade show work was its own work and was successful in protecting its jurisdiction using the grievance procedure as well as two, separate 10(k) awards in which the

³ The last fully written agreement, dated October 18, 1983, expired on April 30, 1986, but was extended from year to year, only sometimes in writing, with increases of wages and contributions as agreed upon between the Carpenters and the local Building Contractors Association "BCA".

Board upheld the ACCCA's assignment of the show work in dispute to the Carpenters. *Carpenters Local 623 (Atlantic Exhibit Services)*, 274 NLRB 71 (1985); *Painters Local 1447 (Hargrove)*, 306 NLRB 97 (1992).

At some point in or prior to 1995, the New Jersey Sports and Exposition Authority also became an owner of the Center and in 1995, prior to the completion of the West Hall, determined to manage it through a private management company. SMG was selected; and SMG continued to honor the terms of ACCCA's collective-bargaining agreement until SMG negotiated a new agreement with the Carpenters in 1996. That agreement covered O&M work, which was to be performed by members of the Carpenters who were full employees of SMG, employed 40 hours each week. As an addendum, the parties also entered into a "project-only" agreement, a 3-page document in which SMG agreed to be bound by the current BCA agreement as to all Carpenters' labor, other than the O&M employees, hired to work on specific projects, such as major renovations or construction projects within the facility.

The project-only agreement also permitted SMG to hire casuals to do trade show work—construction of exhibits, construction of hard wall displays, and the type of work that had traditionally been done by the Carpenters. That was contingent on the success of the Carpenters in negotiating a separate agreement with SMG to cover the work of trade shows. However, although SMG and the Carpenters expressly agreed to negotiate a separate collective-bargaining agreement to cover trade show work, they never did so. Rather, they agreed that, contrary to the no-subcontracting practice that had existed for years, trade show work traditionally performed through the Carpenters' hiring hall could be subcontracted. SMG wrote to the Union on April 15, 1996, describing the agreement to be incorporated into the collective-bargaining agreement:

Finally, Trade employees who work on a part-time basis or who perform contracted work for SMG (e.g., "show" labor) will work under a Separate Agreement which will be negotiated as soon as is practicable. It is understood and agreed that the Separate Agreement will contain a provision stipulating that in the event that SMG subcontracts the covered work, the work will be subcontracted to a firm which will be [sic] negotiate an agreement with the (Trade) Local having jurisdiction over that work with SMG. The said sub-contractor will be free to negotiate the terms and conditions of the said agreement and will not be bound by SMG's agreement(s) with the applicable local union.

This is the agreement that the General Counsel contends violates Section 8(e) of the Act.

On September 30, 1998, AES was installing the East Coast Video Show, an annual 3-day exhibit held at the Center in October, pursuant to AES's 3-year agreement with the show producer to act as its general service contractor. In the course of setting up the show, AES employees, represented by the Painters Union, began working from a lift to hang aisle signs at the

Center, when Dennis Lott, Respondent's foreman,⁴ told Patrick Perrino, AES's owner, if he wanted to avoid an altercation on the floor, to instruct the Painters' employees to come down off the lift and stop hanging aisle signs. That was the Carpenters' work. Lott said that he had already asked the Painters to do that and they were not listening to him. Probably at the same time, SMG General Manager Robert McClintock called Howard Casper, AES's secretary-treasurer, on his cell phone. Casper was also on the floor of the Center, and McClintock told him that he had to assign certain work—the hanging of aisle signs and the erection of the entranceway, the registration counters, and the service desk—that AES had previously assigned to the Painters, to the Carpenters. Otherwise, if AES did not assign that work to the Carpenters, he was going to shut the doors, he would remove AES from the building and he would let Casper know if, in the future, he could come back into the building.

Soon after this telephone conversation, Lott told Casper that he had to assign the contested work to the Carpenters and that, if he did not, he was not going to be permitted to work in the building. South Jersey Regional Council of Carpenters business representative Robert Tarby made a similar threat that day. He wanted AES to sign the contract that had been agreed on with other show contractors and, "if we didn't sign the contract, we weren't going to be allowed to work in the building."⁵ The next day, McClintock said that the problem could be solved either by asking SMG to hire members of the Carpenters, because SMG had the exclusive right to supply labor in the building, or through a contractor which had an agreement with the Carpenters, because SMG would waive its right to supply labor to such a company. On October 2, McClintock wrote Casper that he reserved its "right to take action . . . seeking financial redress from [AES] and a complete review of [its] right to continue operating" in the Center.

The substance, then of Respondents' actions was to use the SMG-Carpenters' union-signatory clause to prevent AES from doing business in the Center. Not every provision with a "cease doing business" objective is necessarily unlawful. Contract clauses that fall within the literal proscription of Section 8(e) are nevertheless lawful if they have the primary objective of preserving or protecting work performed by the employees of the employer bound by the contractual provision. Respondents contend that the primary objective of their provision is to preserve bargaining unit work; the General Counsel and AES contend that the clause is secondary in nature. In *NLRB v. Longshoremen ILA*, 473 U.S. 61 (1985), the Supreme Court held that the question of whether an agreement to cease doing business is a lawful work preservation agreement or has a proscribed secondary objective depends on "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the primary employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy

⁴ The counsel for the General Counsel conceded that there is insufficient evidence that Lott was a union steward or agent, as alleged in the complaint, when he spoke to Perrino.

⁵ In so finding, I do not believe Tarby's denial of this threat, which affirmed what was implicit in his request of Casper that failure sign the contract would leave Casper without work, because he would not have a union contract.

union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees.” *Longshoremen ILA*, supra at 75, quoting *National Woodwork Mfrs. Assn.*, 386 U.S. 612, 644–645 (1967). The Court reaffirmed, *Longshoremen ILA*, supra at 76, its analysis in *NLRB v. Longshoremen ILA*, supra 447 U.S. 490 (1980), in which it explained:

Under this approach, a lawful work preservation agreement must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called “right of control” test of [*NLRB v. Enterprise Assn. of Pipefitters*, 429 U.S. 507 (1977)]. The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work. [447 U.S. at 504–505.]

The SMG-Carpenters’ provision is not limited to addressing the labor relations of SMG vis-a-vis its own employees, but instead seeks to regulate the labor policies of other, neutral employers by requiring them to have agreements with the Carpenters, an objective that is clearly secondary. By its terms, as applied by Respondents, the agreement prohibits SMG from subcontracting work within the Carpenters’ jurisdiction to the trade show’s owner or producer which hired AES, or to AES, because AES does not have a contract with the Carpenters, and therefore seeks to regulate the labor policies of AES, over which SMG exercises no right of control. The Board has consistently held that such union signatory subcontracting agreements have a secondary, rather than primary, work preservation objective, and are unlawful under Section 8(e). As it stated in *Iron Workers (Southwestern Materials)*, 328 NLRB No. 142, slip. op. at 4 (1999), quoting *Chicago Dining Room Employees (Clubmen, Inc.)*, 248 NLRB 604, 606 (1980):

It is well settled that contract clauses which purport to limit . . . subcontracting to employers who are signatories to union contracts, so-called union-signatory clauses, are proscribed by Section 8(e). Such clauses are viewed as not being designed to protect the wages and job opportunities of unit employees, but as being directed at furthering general union objectives and undertaking to regulate the labor policies of other employers.

The union-signatory clause, quoted above, is utterly inconsistent with Respondents’ theory that the clause was agreed on solely to preserve work. The clause requires SMG to cease doing business with the trade show exhibitor or AES in order to influence AES’s labor relations policies. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 652–653 (1982). The provision was aimed at expanding the Union’s reach. In negotiations with AES in 1998, further discussed below, the Carpenters insisted on an agreement covering seven different counties in southern New Jersey, including hotels in and around Atlantic City, where AES had an agreement with the Painters and performed the majority of its jobs,⁶ ensuring that its agree-

formed the majority of its jobs,⁶ ensuring that its agreement with the Painters would be splintered and that U jurisdiction would be expanded. The Union simultaneously rejected AES’s offer to enter into an agreement with the Carpenters for solely the Center. SMG was aware of the positions of the parties to the negotiations. Accordingly, I conclude that the SMG-Carpenters union-signatory agreement was not intended to preserve work but was intended to satisfy the union’s objectives elsewhere.

The second of Respondents’ defenses is that the work involved in trade shows is excluded by the proviso to Section 8(e), which applies “to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work.” Regarding whether SMG is “an employer in the construction industry,” the record demonstrates that SMG acts as the agent and manager for the Center, which hosts many trade shows as part of its business. These trade shows are booked by a show producer or owner, which enters into a license agreement with SMG for the presentation of the show over a specific period of days. Typically, the show producer or owner in turn enters into an agreement with a general service or trade show service contractor “service contractor,” such as AES, to set up the floor plan and common areas for the show and facilitate the participation in the show of the exhibitors, who rent their space from the show’s owner or producer. The contractor needs labor to set up the show. The license agreement, which by its terms is also binding on the contractor, provides, among other things, that (1) the licensee shall pay for all “set-up and/or labor expressly not included in the License Agreement”; (2) SMG shall provide certain services at the Center on an exclusive basis;⁷ and (3):

Licensee agrees not to violate or jeopardize any labor agreement entered into by ACCCA, SMG and/or the Authorities. If any such labor agreement is applicable to Licensee or any of Licensee’s employees or independent contractors then Licensee hereby agrees to comply and/or cause its employees and independent contractors to be in compliance with all of the provisions of all such labor agreements. Licensee shall use good faith efforts to prevent all strikes, lockouts and/or labor disputes at the Center.

Before 1965, the exhibitor ordered labor from the ACCCA, which hired employees and then billed the exhibitor for the cost of their services. With SMG’s engagement as the management company, SMG took the place of ACCCA and changed the procedure somewhat. Thus, when an exhibitor needed carpenters, it would advise the contractor, such as AES, which would then advise the building’s convention service manager (SMG employed four or five convention service managers) of its need for carpenters and how many. SMG paid those carpenters and then billed the contractor for that expense, and the contractor

⁶ AES sets up approximately 100 shows in the geographic area, of which about 15–20 are at the Center.

⁷ Unfortunately, only a form of the license agreement is in evidence, not the actual agreement under which the Video Show was bound. The services to be provided by SMG to the Video Show are not set forth in the form.

would then be reimbursed by the exhibitor. Subsequently, in February 1997, in anticipation of the opening of the new West Hall, SMG announced to its exhibitors that the Center would not be directly supplying labor for the installation or dismantling of exhibits, but labor would be supplied through the general service contractors. SMG recommended that the exhibitors contact the contractors for information. On June 5, 1997, Andy Minton, SMG's assistant general manager, wrote Casper that SMG was still negotiating the union trade show contracts and that, until new union jurisdictions were set, SMG would still be working under the prior set of "union guidelines," which included the work "historically done by the carpenter." SMG advised Casper on July 7, 1997, that it retained the exclusive right to provide carpenters to perform trade show work, and it was a violation of the license agreement for Casper to do work utilizing labor other than that provided by SMG. By letter dated November 11, 1997, McClintock wrote AES that, effective January 11, 1998, SMG would no longer be providing carpenter labor directly to service contractors or exhibitors as it had in the past and advised that it would be appropriate for AES to make alternate arrangements to obtain labor to perform those tasks. McClintock added that the Center retained the "right . . . to reassert it's [sic] right to provide this labor on an exclusive basis under terms and conditions it negotiates," if there was a potential for "labor activity which would negatively impact the overall operation" of the Center.

Sometime after, McClintock asked Casper to meet with the Carpenters to see if they could reach an agreement; and so Casper became the spokesperson for a group of general service contractors in negotiations with the Carpenters. Ultimately, he reached an agreement for all the contractors, but not himself, because, among other provisions, he could not agree to the Carpenters' demand that the agreement not be limited to the Center, but cover all show work at all venues throughout a seven-county area in southern New Jersey; and the Carpenters would not accept Casper's offer to enter into an agreement to cover work solely at the Center, on condition that the Painters would give permission. But the other service contractors signed individual agreements with the Carpenters; and, with the new agreements, instead of ordering labor from SMG, the exhibitors could hire their own employees to install and tear down their exhibits. Signatory contractors were now permitted to obtain labor by calling the Carpenters' hiring hall directly, benefits trumpeted by SMG in a letter to its exhibitors, dated August 18, 1998. Thus, Carpenters-represented employees were employed and paid directly by the service contractors, and SMG was no longer the conduit for the hiring of employees. But, if the service contractor was not a signatory to a collective-bargaining agreement with the Carpenters, SMG announced, "the Atlantic City Convention Center will continue to provide that labor under the pre-existing agreement. This labor will be supplied directly to the Service Contractor at our cost." AES, not being a signatory to the new agreement, was thus still required to obtain its Carpenters' labor from SMG, which continued to arrange for the hire of carpenters under the project-only agreement.

So, as of 1999, SMG permitted subcontracting of all carpentry work and encouraged its service contractors to sign their own contracts with the Carpenters; and those individual con-

tracts resulted in a number of benefits to them over the old ACCCA agreement, including the elimination of double time on weekends, elimination of nonworking personnel, and revised jurisdictional lines which allowed the service contractors to utilize the less-expensive employees represented by the Painters rather than employees represented by the Carpenters on certain jobs. For example, the agreement negotiated by Casper permitted the Carpenters and Painters to share jurisdiction over the hanging of aisle signs, depending on how they are constructed; and, under certain circumstances, exhibitors are allowed to set up their own areas, using their own employees for work that is outside the jurisdiction of the Carpenters.

Essentially, SMG removed itself from the role of an employer. It became no more than a surrogate for the hire of members of the Carpenters, only if a service contractor refused to comply with the obligations of its unlawful union-signatory subcontracting agreement.⁸ Having made the determination that it wanted to remove itself from hiring employees to work on trade shows, and having pursued that determination by announcing that it would permit subcontracting, there is nothing in the record that demonstrates that, as part of SMG's function, it needed to hire anyone to put on a trade show. Rather, it needed labor to maintain its building, and it may need craft labor in the event that it planned to do some major renovations. Otherwise, its sole function is to manage the Center for the purpose of renting its space for conventions and trade shows.

There is no definition of the "construction industry" in Section 8(e), just as there is no definition of the "building and construction industry" as used in Section 8(f), which allows a 7-day waiting period for the purposes of a union-security provision and permits prehire agreements between "an employer engaged primarily in the building and construction industry" and "a labor organization of which building and construction employees are members." *Teamsters Local 83 (Stanley Matuszak)*, 243 NLRB 328 (1979). Congress supplied no reason for the different terminology used in those two Sections of the Act, and the legislative history does not mandate an answer for whether either Section was intended to cover an employer managing buildings used in the exhibition and trade show industry. Part of the discovery of the intent of Congress begins with the Supreme Court's 1958 decision in *Carpenters Local 1976 v. NLRB*, 357 U.S. 93 (1958), that a union could not engage in a strike or other concerted activity to enforce a "hot cargo" agreement—one that required an employer to boycott the goods or services of another employer with whom the union had a dispute—but employers and union were free to enter into such agreements, and voluntary compliance with them were lawful. Section 8(e), enacted in 1959, was designed to eliminate that loophole, forbidding voluntary agreements. *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 628 (1975). The provision represented a compromise between the positions of the House, which wanted to prohibit all hot cargo provisions, and the Senate, which wanted to outlaw agreements only in the trucking industry. Ultimately, the House conferees

⁸ There is little in the record that indicates that SMG supervised the work of the carpenters, other than the fact the Lott was employed as a foreman.

prevailed, but the Senate conferees insisted on provisos that exempted the garment industry and “agreements relating to work to be done at the site of a construction project.” *Woelke & Romero Framing v. NLRB*, supra at 655. The Court’s decision makes clear that there was a uniformity of opinion, as revealed by the committee report and statements of legislators,⁹ that

These statements reveal that Congress wished “to preserve the status quo” regarding agreements between unions and contractors in the construction industry. *National Woodwork Manufacturers Assn.*, supra To the extent that subcontracting agreements were part of the pattern of collective bargaining in the construction industry, and lawful, Congress wanted to ensure that they remained lawful. [456 U.S. at 657]

Indeed, the Court found ample evidence that Congress believed that union-signatory contract clauses were part of the pattern of collective bargaining in the construction industry and noted testimony that such agreements were used extensively by the building trades unions. The Board has also found that the Section 8(e) proviso: “indicates that Congress sought only to preserve the status quo and the pattern of bargaining in the construction industry at the time the legislation was passed.” *Carpenters District Council (Alessio Construction)*, 310 NLRB 1023, 1027 (1993), cited with approval in *Operating Engineers Local 520 (Massman Construction)*, 327 NLRB 1257 (1999), *NLRB v. Denver Building Trades Council*, 341 U.S. 675 (1951), in which the Supreme Court found that picketing a general contractor’s entire project in order to protest the presence of a nonunion contractor was an illegal secondary boycott, also contributed to Congress’ decision to adopt the 8(e) proviso, albeit Congress’ reason was “only partly concerned with jobsite friction.” *Woelke & Romero*, supra at 662.

In *Carpenters (Rowley-Schlingens)*, 318 NLRB 714, 715 (1995), the Board found that the employer, Rowley, sold office products, including supplies, furniture, and draperies. It also designed office interiors, and, as part of that business, it sold and installed floor covering, including carpeting, hardwood, vinyl sheeting, and vinyl tiling at, among various commercial sites, newly erected buildings and existing buildings undergoing renovation or remodeling. In the course of that work, the

employer usually subcontracted to one particular firm the work of installing the flooring. The Board then held that the installation of floor covering at construction, renovation, and remodeling sites is construction industry work of the type performed by special trade contractors. It relied on the definition of construction in *Painters Local 1247 (Indio Paint)*, 156 NLRB 951, 959 (1966), that “the so-called building and construction concept subsumes ‘the provision of labor whereby materials and constituent parts may be combined on the building site’ to form, make or build a structure.” The Board also adopted the definition of construction used in the Standard Industrial Classification (SIC) Manuals for 1957 and 1987 that: “The term construction includes new work, additions, alterations, reconstruction, installations, and repairs.” Both SIC manuals recognize the installation of floor covering as a special trade within the construction industry.

The Board then held that, although it is necessary for the purposes of Section 8(f) to show that the employer is primarily engaged in the construction industry, it is unnecessary to do so for the purposes of Section 8(e). If an employer actually performs construction work, it may be covered by the proviso. Thus, the Board wrote, 318 NLRB 714, 715–716:

It is significant that the application of the construction industry proviso of Section 8(e), unlike Section 8(f), is not conditioned on an employer’s being primarily engaged in the construction industry. The 8(e) proviso permits the establishment of union-signatory subcontracting clauses in the construction industry as a means of reducing the tensions that typically arise among the various crafts when union and nonunion labor are assigned to the same construction site. Given the relatively short-term nature of construction work, Section 8(f) attempts to assure the ready provision of labor and the prehire establishment of wages, hours, and other terms and conditions of employment in order to avoid the uncertainties and disruptions that would arise if, as is likely, negotiating an agreement took longer than the construction work itself. Thus, the underlying policies as well as the pertinent language of the two subsections differ. Additionally, as the Board observed in [*Carpenters Local 743 (Longs Drug)*], 278 NLRB [440 (1986)], at 442, citing [*Los Angeles Building & Trades Council (Church’s Fried Chicken)*], [183 NLRB 1037 (1970)], “[W]hether an employer is ‘an employer in the construction industry’ within the meaning of the first proviso of Section 8(e) is dependent on the circumstances of each situation, rather than on the principal business of the employer.” Accord: *District Council of Carpenters v. Rowley-Schlingens*, 2 F.3d [765 (7th Cir. 1993)] at 767–769. [Footnote omitted.]

Over Rowley’s claim that only a relatively small amount of its entire business was construction site work, the Board found that “a significant absolute amount of [Rowley’s] flooring installation work is performed at construction sites” and that, specifically, the two projects where the disputes started were, in fact, “construction projects.” *Carpenters (Rowley-Schlingens)*, supra at 716. In addition, the Board found that Rowley had control over the work force, even though it did not directly employ the floor covering installers, because of its close connection with the subcontractor, whose owner was concurrently

⁹ Senator John F. Kennedy, who was chairman of the Conference Committee, stated, “The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of the construction project.” 105 Cong. Rec. 17900 (1959), 2 Leg. Hist. 1433.

Senator Kennedy also said:

The Landrum-Griffin bill extended the “hot cargo” provisions of the Senate bill, which we applied only to Teamsters, to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. Both changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries. [105 Cong. Rec. 17899 (1959), 2 Leg. Hist. 1432.]

employed by Rowley. In so finding, the Board relied on the fact that Rowley procured its flooring installation contracts at construction sites through competitive bidding and distinguished *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294 (1985), on the ground that there was no competitive bidding and that Polk's "carpet sales and installations were principally to home owners of already existing dwellings." *Carpenters (Rowley-Schlimgen)*, supra at 716 fn. 11.

The issue, then, is whether SMG was an employer engaged "in construction work at construction sites during the period for which the unfair labor practice [was] alleged." *Carpenters (Rowley-Schlimgen)*, supra at 716.¹⁰ Thus, it is appropriate¹¹ to look at, as the Board did in *Rowley-Schlimgen*, the SIC Manuals, which define the term "construction" as "includ[ing] new

work, additions, alterations, reconstruction, installations, and repairs." There is no reference to the trade show or convention service enumerated in the SIC Manuals in any of the functions of the construction industry. Rather, they list under "Miscellaneous Business Services, Business Services, Not Elsewhere Classified" the following businesses: "Convention bureaus," "Convention decorators," "Exhibits, building of: by industrial contractors," and "Trade show arrangement." The newer North American Industry Classification System of 1997 states at Section 23, page 89, that construction

comprises establishments primarily engaged in the construction of buildings and other structures, heavy construction (except buildings), additions, alterations, reconstruction, installation, and maintenance and repairs. Establishments engaged in demolition or wrecking of buildings and other structures, clearing of building sites, and sale of material from demolished structures are also included. This sector also includes those establishments engaged in blasting, test drilling, landfill, leveling, earthmoving, excavating, land drainage, and other land preparation. The industries within this sector have been defined on the basis of their unique production processes. As with all industries, the production processes are distinguished by their use of specialized human resources and specialized physical capital. Construction activities are generally administered or managed at a relatively fixed place of business, but the actual construction work is performed at one or more different project sites.

The 1997 Classification System specifically adds "Convention and Trade Show Organizers" (561920) as: "This industry comprises establishments primarily engaged in organizing, promoting, and/or managing events, such as business and trade shows, conventions, conferences, and meetings (whether or not they manage and provide the staff to operate the facilities in which these events take place)."

At the time that SMG made its demand of AES to give the disputed work to the Carpenters, SMG had not competitively bid on the job (nor is there evidence that SMG ever bid competitively on jobs);¹² and there is no indication that it employed one employee in construction work at the Center.¹³ The only work being performed on the floor of the Center was by members of the Painters, who were employed by AES, and were doing work, Respondents claimed, that should have been performed by members of the Carpenters, who were not employed by SMG. As a result, SMG told Casper to hire Carpenters to do that work, or else SMG would, or else AES would not work. So, at the time that the dispute occurred, SMG was not even an employer in any industry other than being the manager of a

¹⁰ Board law does not provide any specific answers. There is not one binding authority cited by any of the parties that holds that trade show work is construction work. All the decisions in which the proviso has been applied involve work performed on permanent buildings and structures, not the type of work that is done here, such as the hanging of an aisle sign which will come down in a few days. Respondents' reliance on *Expo Group*, 327 NLRB 413 (1999), is misplaced. There, the administrative law judge found, in the context of a 8(f) defense, which permits unions and employers to enter into prehire agreements if the employer is primarily engaged in the construction industry, and also allows for the expedited application of union-security clauses after just 7 days of employment, rather than the 30-day grace period applicable in all other industries, that an employer in the business of setting up and fabricating exhibits for the trade show and convention industry was not entitled to the 8(f) exemption. The construction work performed by Expo's employees was "incidental to its mission of producing trade shows," Id. at JD slip op. 17, "[e]ven assuming for the sake of analysis that the work of assembling displays and exhibits constitutes activity in the construction industry," Id., which the judge found may "literally fall within the meaning of the word construction," Id. at 16, Expo was only secondarily engaged, and not primarily engaged, in the construction industry. Id. at 17. Thus, that Decision did not hold that the work in dispute was construction work. Moreover, the precise issue as to whether the employer was engaged even secondarily in the construction industry was not discussed by the Board, and there is no indication that the parties filed exceptions to that specific conclusion of the administrative law judge. The administrative law judge's decision in *Freeman Decorating Co. (IATSE Local 39)*, JD(ATL)-12-99 at slip op. 23-25, and the General Counsel's Division of Advice memorandum in Case 10-CA-20488-1-4 (1985) are also not binding. No exceptions were filed to the judge's decision, and so the Board never ruled on it. The analysis of the Division of Advice is simply the position of the General Counsel, no more binding on the Board (or on me) than the brief of the General Counsel in this proceeding. Advice memoranda do not constitute Board law. Finally, the issue of whether a trade show contractor was lawfully entitled to enter into a pre-hire agreement was never reached in *Shepard Decorating Co.*, 196 NLRB 152 (1972), because the administrative law judge determined that the union had previously demonstrated its majority status. It was reached in *Animated Displays Co.*, 137 NLRB 999, 1020-1022 (1962), in which the trial examiner determined that a manufacturer of exhibits for trade shows was not primarily engaged in the construction industry under Section 8(f). The parties, however, apparently did not except to that conclusion and, at *Animated Displays Co.*, supra fn. 1, the Board adopted pro forma the finding of a violation based on the 7-day union-security clause.

¹¹ Concededly, the answer to at least part of the issue does not depend on the principal business of the employer. But *Rowley-Schlimgen* did discuss the employer's business, as part of "the circumstances."

¹² *Carpenters (Rowley-Schlimgen)*, supra at 716 fn. 11, holds that the manner in which an employer procures its work is "arguably relevant" to the determination of an employer's status in 8(e) cases.

¹³ McClintock testified that, at the time that SMG became the manager of the Center, ACCCA had collective-bargaining agreements with the Carpenters, Painters, Teamsters, Plumbers, Electricians, Stagehands, Laborers, and A.S.M.E. (for the property and maintenance employees), but there is no indication that SMG assumed these contracts or made new contracts with these unions, other than the Carpenters. Moreover, there is no testimony about what work the contracts covered.

convention or exhibition hall, and was not an employer at a construction site.

As noted above, however, even though SMG is not engaged in the construction industry, either primarily or partially, if it performed its own construction on construction projects, it may still be an “employer in the construction industry” for the purposes of Section 8(e) under the Board’s rather broad definition. *Carpenters (Rowley-Schlingens)* demonstrates that, as do *Longs Drug, Church’s Fried Chicken*, and *Columbus Building & Construction Trades Council (Kroger Co.)*, 149 NLRB 1224 (1964) (all involving construction of a retail store). But, in each of these cases, the employer was involved in the construction of a building, something tangible and permanent, even installing carpeting. Respondents contend that it should make no difference that the type of construction engaged in at trade shows is temporary, not permanent. Indeed, although the construction skills required at trade shows are arguably less than all the skills required of carpenters at a traditional construction project,¹⁴ certain jobs require the skills that carpenters have. And there are other similarities to employment in the construction industry. The carpenters are obtained from the Carpenters hiring hall. The employment is casual, probably a little more casual than in building construction. Typically, it takes 2 days or less to build a show, 2 days for the show to run, and 2 days to dismantle the show, thus requiring approximately 6 days from the time the carpenters enter the building until the time they leave. But, about half of the time, the carpenters who set up a show are not available to return to dismantle the show, because they have been assigned to work elsewhere while the show is going on and their work is not required. Thus, the employees work for short periods of time ranging from 4 hours to 2 weeks and averaging 1 or 2 days on any given show.

The work performed by the carpenters was described differently by the parties. The emphasis by AES was on the ease of the job, whereas, predictably, Respondents emphasized how difficult the job was. Casper described that most of AES’s jobs were small events, the majority in hotels, and not in the Center. The vast majority of all the jobs, well in the high 90 percent range, consisted of 10 by 10 or 10 by 20-foot booths, involving no installation and dismantling at all. Most booths are simple pipe and drape, with a piece of carpet, or a pop-up or a “mag-unit,” which the exhibitor supplies, wheeled in and enclosed in a fiber case. It has a spider-like mechanism: when it is removed from the case, it accords out as a metal truss, and on it is placed Velcro and a sign. The installation, according to Casper, is no more difficult. The layout of the exhibitors’ areas is marked on the floor with chalk, tape, or paint. The employees then bring in “metal,” which consists of extruded aluminum pipes, and they attach the pipes together and put a cloth “drape” on the pipes (thus, the industry term of “pipe and drape”).¹⁵ Sometimes, hard wall is used to separate the exhibitors’ booths, but that is not traditional hard wall, but panels that are slid into

portable, freestanding metal supports or panels that interlock. The employees lay carpet in the booths, perhaps move furniture, such as a table, into the booth, and then put a plastic top or skirt on the table. They then move the exhibitors’ freight, which is transported in crates, from the dock onto the show floor and into the exhibitors’ area, and sometimes do some decorating work, such as painting or hanging signs. When the show is over, that process is reversed, the crates are repacked, and the floor is cleaned and restored to its original condition.

AES did, however, need carpenters from time to time, although Casper did not detail when those needs arose. Respondent supplied that information in abundance, not necessarily for work done for AES,¹⁶ but work performed over the years at the Center, starting with the most monumental of the installations, a two-story house, admittedly modular and one not meant to be lived in, but one that needed the services of skilled workmen to put together. Other exhibits are as high as two stories or have multiple levels, requiring stairways and structural supports, so that people can move from level to level. Some exhibits require the building of walls and temporary office structures and one, the construction of a skateboard ramp. Among the less dramatic jobs that carpenters performed were to pry open, repair, and repack the crates that contained the exhibits, lay carpet, bolt exhibits together, hang signs, cut lumber and other materials, build stairs or ramps, install turntables, build stages, erect scaffolding, build docks, and move exhibits. The carpenters who assemble and dismantle the exhibits use the traditional tools of the trade, tools that would be used elsewhere in the construction industry: hammers, screwdrivers, wrenches, pliers, and power drivers or drills. They might also use chalk boxes, nails, bolts, side cutters, Allen wrenches, tape measures, combination squares, hand saws, utility knives, pry bars, ratchets, and cat’s paws, kickers and other carpet laying tools. Carpenters utilize various materials at the shows, including laminates, wood, metal, lightweight aluminum and steel, and fiberglass. The Board found in *Atlantic Exhibit*, 274 NLRB 71, 74, that: “Prefabricated displays can be complex, with two stories and stairways. The displays may be packaged in numerous shipping crates, which may require carpentry repair after repeated use. Erection and dismantling of the displays involves the use of nuts, bolts, screwdrivers, pliers, hand tools, and power machinery. The tools and equipment are conventionally used by carpenters rather than displaymen [the Painters].”

There is no question that some work of skilled carpenters is needed and performed at the Center, although the amount remains in question. The work at trade shows requires the same sorts of skills, utilizes the same sorts of materials, and involves the same sorts of tools as traditional, recognized construction work. It is the kind of work, with the kind of skills, that, if performed at a construction project and as a component of that construction, might be exempt under the proviso. Like the construction industry, basic carpentry skills are a prerequisite for a small amount of the work, the assignment process is through a

¹⁴ For example, carpenters at the Center do not need drywall installation equipment, as they would on traditional construction sites.

¹⁵ The Carpenters do not claim jurisdiction over pipe and drape work at the Center, and thus the contested work in this proceeding represents a very minor portion of AES’s work for the Video Show.

¹⁶ In particular, no proof was elicited as to the necessity that skills of carpenters were required to perform the jobs that Lott and McClintock were demanding, one of which was the hanging of a sign from a wire cable.

hiring hall, the majority of jobs are of short duration, and carpenters who work trade shows are employed by a number of employers. Similarly, there are normally at least two groups of employees working at the Center to set up and break down trade shows, employees represented by the Painters and the Carpenters.

Because of all these similarities, Respondents contend that the purpose of the Act would be served by including the trade show industry within the scope of the 8(e) proviso. But, in *Rowley-Schlimgen*, the Board was careful to answer the threshold question of whether the work that was performed by the employer was, in fact, work that was construction-industry work. Using the prevailing definitions, the Board found that the sale and contracting of floor covering was a craft that was included within the jobs that the construction industry does. Here, the making of aids to exhibits is encompassed within the trade show industry, but is not what is performed in the construction industry. Centering our attention solely on the work that was disputed, the hanging of aisle signs, the erection of the entranceway and the registration counters and the service desk, this is not work that is associated with building a structure. The hanging of aisle signs does not even require the skills of a carpenter, who have no monopoly over the climbing on ladders or getting on a lift. The construction of counters and desks is no more than the making of furniture, like a table or a chair or a bookcase. True, there are undoubtedly carpenters' skills required, but this is not building construction. The only disputed item which cannot be categorized and is unusual to the trade show industry is the entranceway, which may be a two-story structure through which the customers of the show enter. But, even that is the kind of structure which could have been made anywhere and transported to the Center for use there. It never became part of the building but was merely temporary.

All parties agree that the proviso requires that the agreement must apply only to work "to be done at the site," as opposed to in a manufacturer's plant. Thus, a union may properly refuse to handle goods prefabricated in a shop away from the site and delivered for installation at the building site. *National Woodwork Mfgs. Assn. v. NLRB*, 386 U.S. 612 (1967). But the language of the proviso says more; it sets forth the kind of work performed at a construction site and thus defines the nature of the site itself. Thus, in *Carpenters (Rowley-Schlimgen)* the Board examined whether the job was being "done at the site of the construction, alteration, painting, or repair of a building, structure or other work," as the proviso insists. The Board specifically found: "Notably, no party disputes that the Greenway Tower Office and Physicians Plus Building projects over which the Respondent initiated the grievances and court action are construction projects." *Carpenters (Rowley-Schlimgen)*, supra at 716. To the contrary, in *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294 (1985), the employer was found not to be an employer within the meaning of Section 8(e) because "its carpet sales and installations were limited principally to home owners of already existing dwellings." *Carpenters (Rowley-Schlimgen)*, supra at 716, fn. 11.

And so it makes a difference where the work is being performed.¹⁷ In *Rowley-Schlimgen*, buildings were being constructed. The floor covering was installed as part of the construction of the finished building. In *Polk Bros.*, an already existing building was not a construction site within the meaning of the statute, because the dwelling had already been built. Similarly, in this proceeding, whatever work is performed by the Carpenters on the floor of the Center is not being performed at "the site of the construction, alteration, painting, or repair of a building, structure or other work," as Section 8(e) requires. The Center would not be referred to as a construction project, in the sense that appears in the legislative history or in the Supreme Court's decision in *Woelke & Romero Framing*. No occupancy inspections occur and neither construction nor zoning permits¹⁸ are required. Hard hats are not worn, and safety boots are not required. Rather, the Center is an exhibition hall typically used to display items for sale. The Center is not the subject of construction or building. Show owners and producers renting the building cannot mar the building in any manner. They cannot even drive nails or insert screws or hooks; and, if they should damage the Center, they agree to pay the cost of repair or replacement. For this reason, as Tarby testified, "Velcro is a very common thing used in the convention exhibit industry."

The Board has warned against an expansive reading of the construction industry proviso. *Massman Construction*, 327 NLRB 1257 (1999). The primary purpose of the proviso was to preserve the status quo in the construction industry, not the trade show or exhibition industry. There is no proof in this record that Congress in 1959 had any inkling that the trade show industry existed or that the trade show industry traditionally had contractual union-signatory provisions, which were to be preserved.¹⁹ To the contrary, in the case at hand, although the practice was not proved to have existed in 1959, the Carpenters had no more than a tradition of prohibiting subcontract-

¹⁷ SMG contends that "several aspects of the installation work performed by carpenters on trade shows differ not at all from the kind of 'installation' work which they perform on more traditional construction projects (as, for example, the installation of removable selling fixtures in a retail store)." That, of course, is work that is being performed at a traditional construction project and by crafts that are undoubtedly doing something else to the structure. If new selling fixtures were installed in an older building, the installation would not be at a site of construction under *Polk Bros.* That threshold has not even been crossed in this case. Similarly, the question presented is not whether the item that is constructed is permanent or temporary, as much as whether it can reasonably be held as part of "the construction, alteration, painting, or repair of a building, structure or other work," as the proviso requires.

¹⁸ Not even the two-story house required a construction permit.

¹⁹ Whether the industry existed or not is unclear. According to Kenneth Viscovich, a national representative of the United Brotherhood of Carpenters and Joiners of America, the union's relationship to trade shows "began very early . . . generally through the automobile industry and other type shows that were advertising shows basically, introducing the new models." The union would provide workers for those shows "through [its] construction collective bargaining agreements. And in some areas of the country, still continue to provide workers for this industry through our regular construction collective bargaining agreements." Almost all are prehire agreements, because their genesis was the construction-industry contracts.

ing. As a result, neither the language nor the intent of the proviso have been satisfied; and the proviso should not be applied to trade shows at the Center.²⁰ The Board has found that union-signatory subcontracting clauses, under certain circumstances, are valid when they are aimed at avoiding friction among contractors and subcontractors at the site with their union and non-union employees, the *Denver Building Trades* problem. *Carpenters Local 944 (Woelke & Romero Framing)*, 239 NLRB 241, 250 (1978), enfd. en banc sub nom. *Associated Builders v. NLRB*, 654 F.2d 1301 (9th Cir. 1981), affd. in pertinent part 456 U.S. 645 (1982); *Colorado Building & Construction Trades Council (Utilities Services)*, 239 NLRB 253, 256 (1978). "What appears critical is that the potential for conflict is likely to arise only when the non-union laborers are in frequent and relatively close contact with the union craftsmen." *Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975). At best, all that has been shown here is that jurisdictional disputes arise from time to time at the Center between the Carpenters and Painters over some of the work. There has never been any *Denver Building Trades* problem here, or potential for one, that needed to be solved by the unlawful union-signatory provision agreed on by SMG and the Carpenters.

Additionally, assuming that the Center is a construction site, *Carpenters (Rowley-Schlimgen)*, relying on *Longs Drug* and *Church's Fried Chicken*, and *Glen Falls Building & Construction Trades Council (Indeck Energy)*, 325 NLRB 1084, 1087 (1998), require an inquiry into whether SMG possessed control over any segment of labor relations at the site. The Board found that when the employer in *Longs Drug* decided to build a branch outlet store, reserving actual construction work for itself, it also decided not to be the general contractor on the project. As a result, despite the fact that the carpenters installed fixtures at its new drug stores, it did not control the labor relations on the jobsite. The Board found control in *Rowley-Schlimgen*, because the owner of the subcontractor was concurrently employed by Rowley. Here, SMG determined not to be involved in the hiring of employees to work trade shows. Rather, it ceded all responsibilities to the show owner and producer, the exhibitors, and their service contractors; and at the time that it threatened AES for improperly assigning work, it had no control over AES's employees. Indeed, unlike all the other 8(e) cases, SMG does not have a proprietary interest in what is being built, such as an additional retail store, or what is being sold, such as carpeting. Instead, the products that are exhibited, and the carpentry work that has aided in the exhibits of those items, do not belong to SMG, which has no interest other than ensuring that the Center obtains its rent and the premises are returned timely and clean of the exhibit. Respondents had the burden of proving that they were entitled to the benefits of the proviso, and more particularly had the burden of proving that SMG controlled the labor relations at the jobsite.

²⁰ I make no finding with respect to AES's current collective-bargaining agreement with the Painters, and another which it agreed to with the Metropolitan Regional Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters Union, covering eight counties in Pennsylvania, both of which have 8(f) prehire and 8(e) subcontracting language.

Polk Bros., 275 NLRB 294, 296. They did not do so. For this additional reason, SMG was not "an employer in the construction industry" within the meaning of Section 8(e).

Accordingly, the 8(e) proviso does not apply to the work of AES and the conduct of Respondents in entering into, maintaining, and attempting to enforce their agreement violated Section 8(e) of the Act. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, including my observation of the witnesses as they testified and my reading of the briefs filed by all parties,²¹ I issue the following recommended²²

ORDER

A. Respondent South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Union), its officers, agents, and representatives, shall

1. Cease and desist from

(a) Entering into, maintaining, enforcing, or giving effect to its April 15, 1996 letter of agreement with Spectacor Management Group "SMG" with respect to trade show labor pursuant to which SMG agrees to cease doing business with any other person within the meaning of Section 8(e) of the National Labor Relations Act, 1947, as amended.

(b) Entering into, maintaining, invoking, giving effect to, or enforcing any other agreement, express or implied, whereby SMG ceases or refrains, or agrees to cease or refrain, from doing business within the meaning of Section 8(e) of the Act with Atlantic Exposition Services, Inc., or any other general service or trade show service contractor at the Atlantic City Convention Center.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in Atlantic City, New Jersey, copies of the attached notice marked "Appendix A."²³ Copies of the notice, on forms

²¹ AES's contention in its brief that Respondent violated the Act by insisting on its signing a collective-bargaining agreement covering a seven-county area in New Jersey is rejected. That was not alleged in the complaint as a violation of the Act.

²² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²³ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals."

provided by the Regional Director for Region 4, after being signed by the Union's authorized representative, shall be posted by the Union immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Union has gone out of business, the Union shall duplicate and mail, at its own expense, a copy of the notice to all current members and former employees employed by SMG at any time since September 30, 1998.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by SMG, if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

B. Respondent Spectacor Management Group (SMG), its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Entering into, maintaining, enforcing, or giving effect to its April 15, 1996 letter of agreement with South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, with respect to trade show labor pursuant to which SMG agrees to cease doing business with any other person within the meaning of Section 8(e) of the National Labor Relations Act, 1947, as amended.

(b) Entering into, maintaining, invoking, giving effect to, or enforcing any other agreement, express or implied, whereby SMG ceases or refrains, or agrees to cease or refrain, from doing business within the meaning of Section 8(e) of the Act with Atlantic Exposition Services, Inc., or any other general service or trade show service contractor at the Atlantic City Convention Center.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Atlantic City, New Jersey, copies of the attached notice marked "Appendix B."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by SMG's authorized representative, shall be posted by SMG immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by SMG to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, SMG has gone out of business or closed the facility involved in these proceedings,

SMG shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by SMG at any time since September 30, 1998.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that SMG has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT enter into, maintain, enforce, or give effect to our April 15, 1996 letter of agreement with Spectacor Management Group "SMG" with respect to trade show labor pursuant to which SMG agrees to cease doing business with any other person within the meaning of Section 8(e) of the National Labor Relations Act, 1947, as amended.

WE WILL NOT enter into, maintain, invoke, give effect to, or enforce any other agreement, express or implied, whereby SMG ceases or refrains, or agrees to cease or refrain, from doing business within the meaning of Section 8(e) of the Act with Atlantic Exposition Services, Inc., or any other general service or trade show service contractor at the Atlantic City Convention Center.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SOUTH JERSEY REGIONAL COUNCIL OF
CARPENTERS, LOCAL 623,

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT enter into, maintain, enforce, or give effect to our April 15, 1996 letter of agreement with South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, with respect to trade show labor pursuant to which we agree to cease doing business with any other person within the meaning of Section 8(e) of the National Labor Relations Act, 1947, as amended.

WE WILL NOT enter into, maintain, invoke, give effect to, or enforce any other agreement, express or implied, whereby we cease or refrain, or agree to cease or refrain, from doing business within the meaning of Section 8(e) of the Act with Atlantic

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

²⁴ See fn. 22.

Exposition Services, Inc., or any other general service or trade show service contractor at the Atlantic City Convention Center. WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

SPECTACOR MANAGEMENT GROUP